IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re: Tyson Foods, Inc. Securities Litigation	))))	Civ. A. No. 01-425-SLR

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MEMORANDUM OPINION

Dated: June 17, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

On June 22, 2001, the first of several class actions were filed against Tyson Foods, Inc. ("Tyson Foods"), Don Tyson, John Tyson and Les Baledge alleging violations of Section 10(b) and 20(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j and 78t and Rule 10b-5. (D.I. 1) On September 21, 2001 this court consolidated these cases pursuant to the Private Securities Litigation Reform Act, Pub. L. 104-67, 109 Stat. 737 (1995) (codified at various sections of 15 U.S.C.), and named, as lead plaintiffs, Aetos Corporation, Pelican Limited Partnership, Stark Investments, L.P., and Shepherd Investments International, Ltd. (collectively the "Lead Plaintiffs").

On January 22, 2002, defendants moved for dismissal of the complaint. On October 23, 2002, following briefing and oral argument, the court granted in part and denied in part defendants' motion to dismiss, finding that two of the statements by Tyson were potentially actionable under federal securities law. (D.I. 25 at ¶ 14)

On October 6, 2003, the court certified this action as a class action on behalf of all persons and entities similarly situated who purchased securities in IBP, Inc. ("IBP") on or before March 29, 2001, and subsequently sold those securities during the period from March 30, 2001 through June 15, 2001, inclusive, and who sustained damages as a result of such

transactions. (D.I. 139, 140) The court also appointed Lead Plaintiffs as class representatives.

Presently before the court are the parties' cross motions for summary judgment. (D.I. 157, 161, 163) Having reviewed the parties' briefs and heard oral argument, the court concludes that defendants are entitled to summary judgment for the reasons that follow.

II. BACKGROUND

This case arises from events surrounding a merger between two of the nation's largest protein distributors. Tyson Foods is the nation's largest poultry distributer and IBP is the nation's largest beef and second largest pork distributor. The details of that transaction are described in great detail in a Chancery Court opinion in which the Chancery Court found that IBP had not breached the parties' agreements and that IBP was entitled to specific performance. In re IBP Shareholders Litigation, 789 A.2d 14 (Del. Ch. 2001).

A. IBP Auction

In July 2000, IBP management informed its board that it was interested in pursuing a leveraged buyout of IBP with the assistance of the investment bank Donaldson, Luftkin & Jenrette. Following negotiations, management and other investors (the "Buyout Group") agreed that the Buyout Group would purchase all of IBP's shares at $22.55 per share. In re IBP Shareholders

Litigation, 789 A.2d at 25-27.

On November 12, 2000, Smithfield Foods, the nation's largest pork producer, made an unsolicited bid for IBP offering a stock exchange offer worth $25 per share to IBP shareholders. On November 24, 2000, defendants Don and John Tyson met with Bob Peterson and Richard Bond, IBP's Chief Executive Officer and President/Chief Operating Officer, to discuss the potential combination of Tyson Foods and IBP. Id. at 28-30. At that meeting, the representatives discussed the possibility that certain projections prepared in relation to the earlier management LBO (the "Rawhide Projections") may not be met.

On December 4, 2000, Tyson Foods, contingent upon a quickly timed due diligence review, proposed to acquire IBP in a two-step cash and stock exchange valued at $26 per share. Tyson Foods and IBP executed a confidentiality agreement which stated that Tyson Foods could not rely on oral assurances that were not converted to written representations and warranties and expressly provided that IBP and its representative would have no liability from the use or accuracy of any non-public information provided to Tyson Foods through the course of due diligence (the "Confidentiality Agreement"). Id. at 31-32.

Tyson Foods began its due diligence process with IBP. During that review, Tyson Foods was informed that there had been fraud uncovered at DFG, an IBP subsidiary, and that there were

serious business problems with that operating unit. Tyson Foods also learned that certain weather conditions were likely to have an adverse effect on IBP's abilities to meet its forecasts in the Rawhide Projections. Id. at 33-35.

In mid and late December 2000, IBP prepared and conducted an auction between Tyson Foods and Smithfield. The Rawhide Projections were updated for use in the final bidding. On December 28, 2000, Tyson Foods received IBP's updated projections which revised downward IBP's projected FY 2000 earnings by $70 million. Following receipt of these new projections, Tyson Foods raised its bid to $27 per share in cash. Following its $27 per share offer, Tyson Foods had two additional due diligence calls with IBP in which DFG's problems were discussed and Tyson Foods was informed that a restatement of financials may be required and that IBP may take an impairment charge. Id. at 37-39. Tyson Foods subsequently raised its bids to $28.50 and later to $30 per share in cash and stock. Id. at 22, 38-39. IBP accepted the latter offer.

On December 29, 2000, the Securities and Exchange Commission ("SEC") sent an email to IBP's special committee's outside counsel. That email contained a letter from the SEC to Bob Peterson commenting on the preliminary Rawhide Proxy as well as on IBP's financials. Inexplicably, the SEC letter was not forwarded to Tyson Foods until January 10, 2001. The SEC letter

addressed a number of issues, including some already identified by Tyson Foods during the course of its due diligence review.

B. Merger Agreement

On January 1, 2001, the parties entered into a merger agreement for the sale of IBP to Tyson Foods (the "Merger Agreement"). The Merger Agreement provided for an initial cash tender offer of $30 per share to be followed by an exchange offer of $30 in Tyson Foods stock for each IBP share. The cash offer period was scheduled to close no later than February 28, 2001. In the event the conditions to the cash offer were not met by that date, Tyson Foods would commence a cash election merger in which IBP shareholders could receive either cash, stock or a combination thereof in the amount of $30 per share.

On January 12, 2001, the Tyson Foods board met and ratified management's decision to enter into the Merger Agreement. The SEC letter was not disclosed to the board nor was a copy of the letter shown to any board member. That same day, a shareholder meeting was held and the Merger Agreement was ratified by the shareholders. The SEC letter was not disclosed to the shareholders. Id. at 43-45.

C. Delays in Cash Offer

On January 16, 2001, Larry Shipley, IBP's Chief Executive Officer, informed Steve Hankins, Tyson Foods' Chief Financial Officer, that the earnings charge arising out of the issues at

DFG might reach $50 million, that a restatement of 1999 earnings might be necessary, and than an impairment study had been commenced but not yet completed. Id. at 45. Hankins has testified that he concluded that IBP would have to restate the financials that had been warranted in the Merger Agreement. On January 17, Tyson Foods announced it was extending the cash offer period because the anti-trust waiting period had not expired. Id. The announcement did not mention the SEC letter, DFG or any potential violation of the Merger Agreement.

Later in January, Tyson Foods again extended the cash offer period on the basis that the offering documents incorporated the IBP's warranted financials which were potentially inaccurate. Id. at 45-46. Tyson Foods indicated it would delay closing the cash offer and commencing the exchange offer until after IBP had settled all outstanding issues with the SEC. Id. On January 25, 2001, IBP sent a letter to Tyson Foods disclosing that IBP earnings would be lowered to $47 million and that IBP was still considering whether a restatement of earnings would be necessary. Id. at 46.

During February, Tyson Foods became increasingly reticent about the IBP deal and began considering a way to negotiate a lower price. Tyson Foods' concern with the IBP deal was augmented by its own poor financial performance. Id. at 47-48. On February 22, 2001, IBP publicly reported that it would restate

its financials in order to take an additional charge at DFG of $32.9 million and an impairment charge at DFG of up to $108 million. On February 28, Tyson Foods terminated the cash tender. John Tyson publicly commented that Tyson Foods would "determine what effect these matters will have on our deal" once IBP had finished its work on its issues with the SEC. Id. at 46. By that time, Tyson Foods had also learned that IBP's earnings were far below the Rawhide Projections. Id. at 48.

In February, Tyson Foods had sought advice from two firms serving as outside counsel, Milbank, Tweed, Hadley & McCloy, LLP and Skadden, Arps, Slate, Meagher & From, LLP. (D.I. 159, exs. 25, 26) Millbank Tweed's qualified opinion letter indicated that Tyson Foods had the right to terminate based on IBP's allegedly inaccurate financial statements which breached IBP's representations and warranties. (D.I. 159, ex. 27) Skadden Arps' opinion focused on renegotiation strategies and did not take a position on whether Tyson Foods may terminate. (D.I. 159, ex. 28) The Skadden Arps opinion discussed possible causes of action that Tyson Foods might have, including fraud in the inducement and breach of warranty.

Defendant Les Baledge, Executive Vice President and General Counsel for Tyson Foods, received the two opinion letters and advised Don and John Tyson, as well as other senior managers, that outside counsel had advised that Tyson Foods had grounds to

terminate the transaction. Baledge did not indicate outside counsel's rationale nor did he provide the memoranda directly to Don Tyson or John Tyson. (D.I. 160, ex. B at 36, 79; ex. D at 89-93; ex. E at 121-23)

IBP began to sense that Tyson Foods wanted to renegotiate and realized that the deal may fall through altogether. Id. Tyson Foods' key management began slowing down the merger implementation process in an effort to provide Don Tyson and John Tyson some time to reconsider their position. On March 5, 2001, Dick Bond met with Don Tyson in an effort to alleviate Don Tyson's concerns. Bond and Don Tyson also subsequently spoke by phone. In these conversations the two discussed DFG, IBP's overall performance and a concern about mad cow disease and hoof-and-mouth disease. Don Tyson did not raise concerns about the SEC letter. Id. at 48-49.

On March 7, 2001, John Tyson sent a memorandum to all Tyson Foods employees stating that the company was still committed to the merger transaction. On March 13, however, John Tyson expressed concern to Bond regarding IBP's first quarter performance and that he wanted Bond's best estimates for IBP's performance for the remainder of the year. Bond sent estimates indicating a range between $1.80 and $2.47 a share, with a best estimate of $2.12. Id. at 49.

On March 13, 2001, IBP filed its restated warranted

financials, which were consistent with its previous release regarding DFG. Id. On March 14, Tyson Foods issued a press release indicating that it was pleased that IBP had resolved most of its SEC issues. The press release also stated that Tyson Foods was continuing to look at IBP's business and its weak first quarter results. Id. On March 15, 2001, in-house counsel for Tyson Foods sent a letter to IBP which indicated Tyson Foods' sentiment that the merger transaction could proceed now that the SEC issues were resolved. Id. at 49-50.

On March 26, 2001, Tyson Foods and IBP representatives met to discuss the transaction. At that meeting, John Tyson suggested that the transaction be repriced to $27-28 per share. Bond suggested that only a $0.50 reduction would be appropriate, although Bond knew that a better approximation would be $28.50 per share. John Tyson privately told Bond that Don Tyson was nervous about the transaction and Peterson and Bond would need to help John Tyson firm up his father's support. Id. at 50.

On March 27, 2001, Merrill Lynch provided to Tyson Foods a revised valuation analysis of IBP which concluded that $30 a share was still a fair price, but provided an analysis to assist in renegotiating the transaction. The analysis was based upon pessimistic assumptions provided by Tyson Foods. Id.

C. Decision to Terminate

On March 28, 2001, a meeting was called of senior management

by Don Tyson. The meeting began by discussing the state of the economy generally and Tyson Foods' own performance. Don Tyson also expressed concern about IBP's poor performance and about mad cow disease. Don Tyson and a select group of his closest advisors then met privately to discuss how to proceed. John Tyson and other senior management were not present for this discussion. Don Tyson returned to the senior management meeting and announced that Tyson Foods should find a way to withdraw from the IBP merger. John Tyson then instructed Baledge to take the steps necessary to terminate the transaction. Neither Don Tyson nor John Tyson conveyed to Baledge the specific rationale discussed at the meeting for the decision. (D.I. 160, ex. E at 160-61; ex. B at 41) On March 29, 2001, Baledge sent a termination letter to IBP and issued a press release, to which the termination letter was attached. The attached letter from Baledge to Peterson and Smith stated:

> On December 29, 2000, the Friday before final competitive negotiations resulting in the Merger Agreement, your counsel received comments from the Securities and Exchange Commission ("SEC") raising important issues concerning IBP's financial statements and reports filed with the SEC. As you know, we learned of the undisclosed SEC comments on January 10, 2001. Ultimately, IBP restated its financials and filings to address the SEC's issues and correct earlier misstatements. Unfortunately, we relied on that misleading information in determining to enter into the Merger Agreement. In addition, the delays and restatements resulting from these matters have created numerous breaches

> by IBP of representations, warranties, covenants and agreements contained in the Merger Agreement which cannot be cured.
>
> Consequently, whether intended or not, we believe Tyson Foods, Inc. was inappropriately induced to enter into the Merger Agreement. Further, we believe IBP cannot perform under the Merger Agreement. Under these facts, Tyson has a right to rescind or terminate the Merger Agreement and to receive compensation from IBP. We have commenced legal action in Arkansas seeking such relief. We hope to resolve these matters outside litigation in an expeditious and business-like manner. However, our duties dictate that we preserve Tyson's rights and protect the interests of our shareholders.
>
> If our belief is proven wrong and the Merger Agreement is not rescinded, this letter will serve as Tyson's notice, pursuant to sections 11.01(f) and 12.01 of the Merger Agreement, of termination.

(D.I. 1, ¶ 25; D.I. 13 at 7). The press release stated:

> Tyson Foods, Inc. announced today that it was discontinuing the Agreement and Plan of Merger between itself and IBP, Inc. The letter from Tyson General Counsel Les R. Baledge to Robert L. Peterson, Chairman and Chief Executive Officer of IBP and JoAnn R. Smith, Chairperson of the IBP Special Committee, is attached.
>
> John Tyson, Chairman and CEO, said, "While we continue to believe that the combination of IBP and Tyson would have created the premiere protein company in the world, we simply cannot endorse a decision to complete the transaction under the facts as we understand them today. My decision today was based on what I felt was in the best interest of our Company and its Shareholders."

(D.I. 1, ¶ 24; D.I. 13 at 6-7)

The press release was drafted by outside counsel who were not aware of the specific business motivations behind the decision to terminate. (D.I. 160, ex. U at 156-57; ex. Q at 113-14) The press release contained a quote attributed to John Tyson which was never made or expressly approved by him. (D.I. 169, ex. D at 47-49) Following issuance of the press release and attached termination letter, there was a swift decline in IBP shares. IBP closed on March 29, 2001, at $22.79 and reached a low of $15 per share on March 30. (D.I. 160, ex. 34)

D. Litigation

As indicated in the above press release, Tyson Foods filed suit on March 29, 2001, seeking rescission or termination of the Merger Agreement. IBP filed suit seeking specific performance. On June 18, 2001, after extensive fact finding, the Chancery Court of the State of Delaware issued its opinion finding against Tyson Foods and in favor of IBP. In re IBP Shareholders Litig., 789 A.2d at 14. The Chancery Court ultimately reached five conclusions: (1) the Merger Agreement and related contracts were valid and enforceable; (2) Tyson Foods was contractually allocated certain financial risks under those agreements, including accounting issues at DFG, which could not serve as a basis for termination; (3) DFG-related issues before the SEC were not a permissible basis for termination; (4) IBP had not suffered a material adverse effect within the meaning of the agreement;

and (5) IBP was entitled to specific performance. Id. at 23.

Following issuance of that opinion, Tyson Foods and IBP reached a settlement whereby the merger would be consummated and all claims against Tyson Foods, including shareholder claims, would be released. In re IBP Shareholders Litig., 793 A.2d 396 (Del. Ch. 2002) (denying vacatur), aff'd, 818 A.2d 145 (Del. 2003). The Chancery Court approved the settlement on the condition that the federal securities claims, which were already being filed in this court, were excluded from the scope of the settlement.

Tyson Foods' shareholders also brought suit in derivative against the Tyson Foods directors for breach of fiduciary duty with respect to the events surrounding the merger. Shapiro v. Allen, Civ. No. 18967 (Del. Ch. Mar. 19, 2003). The Chancery Court, ruling from the bench following oral argument, dismissed the case in its entirety for failure to state a claim. Id.

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec.

Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)).

The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

Lead Plaintiffs assert that the March 29, 2001 press release and termination letter contained material misleading statements regarding IBP and Tyson Foods' decision to terminate the merger, and which had an adverse effect on the IBP stock price. Lead Plaintiffs allege scienter and primary liability on the part of each of the defendants, as well as controlling person liability on the part of defendants Don and John Tyson.

Lead Plaintiffs seek summary judgment on liability, arguing that the Chancery Court's opinion establishes each element of their § 10(b) and § 20(a) claims. (D.I. 167) In Lead Plaintiffs' view, the sole remaining issue of fact to be resolved is damages. Don Tyson and John Tyson, in their motion for summary judgment, assert that Lead Plaintiffs' claims of both primary and secondary liability fail for lack of the requisite scienter and participation in conduct which is actionable under federal securities law. (D.I. 164) Baledge and Tyson Foods, in their motion for summary judgment, assert that Lead Plaintiffs' claims fail due to both scienter and loss causation. (D.I. 162)

A. Section 10(b)

Section 10(b) prohibits the "use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. §

78j(b) (2004). Rule 10b-5, promulgated under § 10(b), makes it unlawful for any person "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary to make the statements made in light of the circumstances under which they were made, not misleading ... in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5(b) (2004).

Therefore, a claim for securities fraud under § 10(b) and Rule 10b-5, require proof of the following: "(1) that the defendant[s] made a misrepresentation or omission of (2) a material (3) fact; (4) that the defendant[s] acted with knowledge or recklessness and (5) that the plaintiff[s] reasonably relied on the misrepresentation or omission and (6) consequently suffered damage." In re Westinghouse Sec. Litig., 90 F.3d 696, 710 (3d Cir. 1996).

1. Made a Misrepresentation or Omission

Don Tyson and John Tyson move for summary judgment on the issue of primary liability on the basis that Lead Plaintiffs have offered no evidence to support a finding of actionable conduct within the scope of primary liability under § 10(b) and Rule 10b-5. The court agrees.

Section 10(b) "prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act." Central Bank, N.A. v. First Interstate Bank, N.A., 511

U.S. 164 (1994). In Central Bank, the Supreme Court ruled that conduct outside the clear scope of § 10(b) is not actionable under implied remedies of secondary liability, such as aiding and abetting a primary violation. Id. at 191.

In determining whether a person has primary liability within the scope of this section, courts apply either the "bright line" test, Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir. 1998), or the "substantial participation" test, Howard v. Everex Sys., Inc., 228 F.3d 1057, 1061 n.5 (9th Cir. 2000). The Third Circuit has not yet determined which test should be applied. See In re IKON Office Solutions, Inc., 277 F.3d 658, 667 n.8 (3d Cir. 2002). Nevertheless, under either test defendants John Tyson and Don Tyson can not be held liable.

In the case at bar, the undisputed facts are that neither Don Tyson nor John Tyson made the statements for which liability is alleged. Under the bright line test, a defendant must actually make the false or misleading statement. See Shapiro v. Cantor, 123 F.3d 717, 720 (2d Cir. 1997). Under the substantial participation test, there must be "substantial participation or intricate involvement" by the defendant in the drafting and preparation of the fraudulent statements "even though that participation might not lead to the actor's actual making of the statements." Howard, 228 F.3d at 1061. For example, where a statement is not directly made by the defendant but the defendant

was substantially involved in the drafting and editing thereof, substantial participation has been found. See, e.g., In re Software Toolworks Inc., 50 F.3d 615, 628 (9th Cir. 1994).

The undisputed evidence in this regard is that Don Tyson and John Tyson had no involvement in the actual crafting of the language of the termination letter and press release. The termination letter, which contained the alleged actionable statements at issue, was signed solely by Baledge and crafted by him with the help of outside counsel. Consequently, Lead Plaintiffs' case fails under the Second Circuit's bright line test. Even under the substantial participation test, however, Lead Plaintiffs' theory falls short.

The crux of Lead Plaintiffs' argument is that Don Tyson and John Tyson should have been involved in the preparation and issuance of the press release, but instead went fishing. At oral argument, Lead Plaintiffs argue that this lack of participation amounts to recklessness. While recklessness may satisfy scienter, it does not relieve Lead Plaintiffs from the obligation to show participation in the conduct at issue here. Lead Plaintiffs' theory would, in effect, impose primary liability for **substantial nonparticipation**. If John Tyson and Don Tyson are liable for inaction, the remedy lies under state law. This, however, is not a theory upon which primary liability under § 10(b) and Rule 10b-5 may attach. See Santa Fe Industries, Inc.

v. Green, 430 U.S. 462, 476 (1977). Consequently, with respect to defendants John Tyson and Don Tyson, the court finds they are entitled to summary judgment on the issue of primary liability.

2. Scienter

Defendants assert that Lead Plaintiffs have failed to provide evidence showing that Baledge acted with scienter in issuing the termination letter containing the alleged misrepresentations. Scienter, of course, is the "mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 426 U.S. 185, 193 n.12 (1976). In the absence of indica of an intent to deceive by the defendant, scienter requires proof of the following: (1) highly unreasonable conduct which represents an extreme departure from the standards of ordinary care; and (2) a danger of misleading buyers which is known to the defendant or so obvious that the defendant must have known of the risk. SEC v. Infinity Group Co., 212 F.3d 180, 192 (3d Cir. 2000). Highly unreasonable conduct is neither simple nor even inexcusable negligence. See id. Therefore, claims predicated upon "corporate mismanagement are not actionable under federal law." In re Craftmatic Securities Litig., 890 F.2d 628, 638-39 (3d. Cir. 1989).

Statements of opinion, if false, may form the basis for a securities fraud claim if made either knowingly or recklessly. See Eisenberg v. Gagnon, 766 F.2d 770, 776 (3d Cir. 1985). A

statement of opinion is not actionable if it's proven to be inaccurate or if its falsity is the result of mere negligence. Id. Instead, only an opinion which "has been issued without a genuine belief or reasonable basis" is actionable. Id. See also In re Donald J. Trump Casino Sec. Litig., 7 F.3d 357, 368 (3d Cir. 1993). It may be inferred that a statement of opinion is made without a genuine belief or reasonable basis where the defendant has notice of the unreliability of the underlying materials and fails to inquire further. See id. (quoting McLean v. Alexander, 599 F.2d 1190, 1198 (3d Cir. 1979)).

In its October 23, 2002 memorandum order denying defendants' motion to dismiss, the court found that two statements contained in the termination letter accompanying the press release were misrepresentations. (D.I. 25 at ¶ 14) Those statements were as follows:

> 1. "Unfortunately, we relied on that misleading information in determining to enter into the Merger Agreement."
> 2. "Consequently, whether intended or not, we believe Tyson Foods, Inc. was inappropriately induced to enter into the Merger Agreement."

(D.I. 25 at ¶ 12) While the court found these statements to constitute misrepresentations for the purpose of denying defendants' motion to dismiss, the court now reexamines these statements in light of a developed factual record and defendants' motion for summary judgment.

a. "We relied on that misleading information"

The first statement contains both a statement of fact (Tyson Foods "relied") and a statement of opinion (IBP provided "misleading" information). With respect to the factual component, Lead Plaintiffs must show evidence that when Baledge asserted that "we relied" he acted with scienter, to wit, they must show either that Baledge intended to deceive the investing public or that his conduct was so reckless, with respect to the danger that the investing public might be misled, that his conduct borders on intentional. See In re Ikon, 277 F.3d at 672 n.16. In either regard, the court finds that there is not sufficient evidence to support Lead Plaintiffs' claim of scienter.

Lead Plaintiffs make eight factual allegations which they assert prove scienter on the part of Baledge: (1) Baledge participated in drafting and disseminating the March 29 press release and termination letter without asking for the rationale and circumstances behind senior management's decision; (2) Baledge authorized a suit to be filed with the intent of depressing the market price of IBP shares in the event Tyson Foods sought to reprice the transaction; (3) Baledge knew that Tyson Foods did not have sufficient facts to allege fraudulent inducement; (4) Baledge instructed outside counsel to draft a complaint without explaining the business rationale, information

which he indisputably did not have, for filing suit; (5) Baledge did not inform Tyson Foods' board of the decision to terminate; (6) Baledge did not attend the meeting where the termination decision was made; (7) Baledge did not give Don Tyson the memoranda prepared by outside counsel addressing Tyson Foods' options for terminating the transaction; and (8) Baledge did not discuss or attempt to dissuade Don Tyson from the decision to terminate once it had been reached. (D.I. 167 at 45-46) If true, the only allegation to support a finding of scienter is Lead Plaintiffs' claim that Baledge filed suit in order to depress the market price of IBP. This allegation, however, is wholly without support in the record. The remaining factual allegations at most allege negligence and possible breaches of fiduciary duty, which plainly are not actionable under § 10(b) and Rule 10b-5. See Santa Fe Industries, 430 U.S. at 476; In re Advanta Corp. Securities Litig., 180 F.3d 525, 540 (3d Cir. 1999); Biesenbach v. Guenther, 588 F.2d 400, 402 (3d Cir. 1978).

With respect to the opinion component of Baledge's statement, Lead Plaintiffs lack evidentiary support for their allegation that the statement was false. In order to prove falsity, Lead Plaintiffs must show that Baledge either did not have a genuine belief that the referenced IBP information was misleading or that under the circumstances his belief was unreasonable. There is no record support for the proposition

that Baledge's belief was not genuinely held. Further, the undisputed fact that Baledge consulted with outside counsel supports the reasonableness of his belief. Although Tyson Foods did not prevail on its claim in Chancery Court, that alone does not prove the unreasonableness of Baledge's belief. To the contrary, while the Chancery Court disagreed with Tyson Foods' interpretation of the relevant agreements, it specifically indicated that Tyson Foods' interpretation was reasonable. See In re IBP, 789 A.2d at 62; Shapiro v. Allen, Civ. No. 18967, at 77-78 (Del. Ch. Mar. 19, 2003). Where, as here, there is no indication of bad faith litigation, a party's statement of opinion as to the veracity of its asserted claims is not made false simply because it proves unsuccessful. As Lead Plaintiffs have not shown that the statement of opinion is actionable, they likewise cannot prove scienter.

b. "We believe Tyson Foods, Inc. was inappropriately induced."

This statement expresses an opinion which, to be actionable, Lead Plaintiffs must prove both falsity and scienter. To prove falsity, Lead Plaintiffs must show that Baledge did not genuinely believe that Tyson Foods was inappropriately induced or did not have a good faith basis for that belief. As discussed above, it is insufficient proof for Lead Plaintiffs to allege merely that Tyson Foods was unsuccessful in the assertion of its claims in Chancery Court.

In their brief, Lead Plaintiffs do not allege that the facts support the conclusion that Baledge did not have a genuine belief in the truth of his statement but instead allege the unreasonableness of that belief. (D.I. 167 at 45-46) As proof of this unreasonableness of belief, Lead Plaintiffs rely on Baledge's absence from the meeting where the final decision on termination was reached. Arguably, under some circumstances, this may amount to a breach of the duty of care owed to Tyson Foods shareholders. It has no logical bearing, however, on the reasonableness of Baledge's belief that Tyson Foods was inappropriately induced. The facts and events forming the basis for that belief occurred well before the March 28, 2001 meeting. Moreover, Baledge's belief was supported by the qualified opinions of two outside law firms. In light of these facts, the court finds that there is not a genuine issue of material fact as to the falsity of Baledge's statement of opinion.

c. Omission of Don Tyson's Motivations

Lastly, Lead Plaintiffs assert that Baledge's termination letter and press release were false because they failed to disclose Don Tyson's motivations for terminating the transaction. (D.I. 158 at 39) In order for an omission of fact to form the basis for a securities fraud violation, the speaker must have a duty to disclose the information. See Chiarella v. U. S., 445 U.S. 222, 228 (1980). Omission of the subjective motivations of

corporate decision makers does not render an honest transaction fraudulent under federal law. See Biesenbach v. Guenther, 588 F.2d 400, 402 (3d Cir. 1978) (failing to disclose the "unclean heart" of a director is not actionable).[1]

After determining that the IBP transaction was no longer in the company's best interests, Don Tyson instructed his son John Tyson who, in turn, instructed Baledge to exercise whatever legal rights may exist to terminate the transaction and to mitigate losses. The information upon which Don Tyson relied in making his determination was publicly available, including economic conditions, industry specific conditions, and Tyson Foods' own economic performance. A reasonable investor could draw the conclusion from the termination letter and press release that Tyson Foods management, and by inference Don Tyson, viewed the IBP transaction as no longer in the company's best interests.

Further, the omission of the business rationale does not render the disclosure of Tyson Foods' legal rationale materially

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[1]See also Vaughn v. Teledyne, Inc. 628 F.2d 1214, 1221 (9th Cir. 1980)("Corporate officials are under no duty to disclose their precise motive or purpose for engaging in a particular course of corporate action, so long as the motive is not manipulative or deceptive and the nature and scope of any stock transactions are adequately disclosed to those involved."); Alabama Farm Bureau Mut. Cas. Co., Inc. v. American Fidelity Life Ins. Co., 606 F.2d 602, 610 (5th Cir. 1979) ("Section 10(b) and Rule 10b-5 were promulgated to prevent fraudulent practices in securities trading and trading on inside information. ... They were not intended to require, under normal circumstances, the disclosure of an individual's motives or subjective beliefs, or his deductions reached from publicly available information.").

misleading. Business judgment necessarily underlies any decision by a company to exercise its legal rights. Lead Plaintiffs' argument, that it was misleading to a reasonable investor to omit the fact that business considerations were involved in the decision to terminate, lacks merit.

The heart of Lead Plaintiffs' argument is revealed in their brief. They argue that

> the entire process by which the termination decision was made and subsequently conveyed to the market was beyond reckless. Defendants must be held responsible for the consequences, whether intended or not, of their conduct. Each of the three individual defendants handled a massive corporate decision in so slipshod and haphazard a manner that was an extreme departure from the standards of ordinary care owed by top corporate executives.

(D.I. 167 at 44). At most, Lead Plaintiffs' allegations might amount to breaches of fiduciary duty owed to Tyson Foods shareholders; they do not, however, support a finding of securities fraud. See In re Advanta Corp. Securities Litig., 180 F.3d at 540. As there was no duty to disclose Don Tyson's rationale, the failure to do so, even if intentional, does not amount to securities fraud.

Therefore, having found that Lead Plaintiffs have failed to adduce evidence in the record that Baledge's statements are actionable under § 10(b) and Rule 10b-5, the court finds that defendant Baledge is entitled to summary judgment.

3. Primary Liability of Tyson Foods

For a corporation to have primary liability under § 10(b) and Rule 10b-5, scienter must be present with respect to at least one of the officers or agents who made a false or misleading statement. See Southland Securities Corp. v. INSpire Ins. Solutions, Inc., 365 F.3d 353, 366 (5th Cir. 2004); Nordstrom, Inc. v. Chubb & Son, Inc., 54 F.3d 1424, 1435 (9th Cir. 1995); United States v. LBS Bank-New York, Inc., 757 F. Supp. 496, 501 n.7 (E.D. Pa. 1990); First Equity Corp. v. Standard & Poor's Corp., 690 F. Supp. 256, 260 (S.D.N.Y. 1988), aff'd, 869 F.2d 175 (2d Cir. 1989). Having concluded that each of the individual defendants is entitled to summary judgment under § 10(b) and Rule 10b-5, as a matter of law, Tyson Foods can not be primarily liable and is entitled to summary judgment.

4. Loss Causation

In the alternative, defendants contend that Lead Plaintiffs have failed to furnish evidence that the alleged misrepresentations at issue are the cause of injury. An essential element of a claim of securities fraud arising under § 10(b) and Rule 10b-5 is that the defendants' act or omission is the cause in fact of plaintiff's loss. 15 U.S.C. § 78u-4(b)(4) (2004). Loss causation requires proof that, but for the defendant's wrongful conduct, the plaintiff would not have incurred injury. See Newton v. Merrill Lynch, Pierce, Fenner &

Smith, Inc., 259 F.3d 154, 177 (3d Cir. 2001). The loss causation element is derived from "'standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains.'" Id. (quoting Bastian v. Petren Res. Corp., 892 F.2d 680, 685 (7th Cir. 1990)). Nevertheless, as the price for securities on open markets is the function of numerous factors and participants, it is rarely possible to isolate a single event as the sole cause of a particular downturn or upturn in the security's price. Consequently, the law requires only that a plaintiff establish that defendant's wrongful conduct was a substantial factor in the market change. See Semerenko v. Cendant Corp., 223 F.3d 165, 187 (3d Cir. 2000).[2]

Defendants contend that the analysis of Lead Plaintiffs' damages expert is insufficient proof of loss causation because it fails to identify what portion of the plaintiffs' economic loss is attributable to the alleged actionable statements and what portion is merely attributable to the termination announcement itself. "To satisfy the loss causation element, a plaintiff need not show that a misrepresentation was the sole reason for the investment's decline in value. Ultimately, however, a plaintiff

[2]Alleging causation under a substantial factor theory is hardly a novel concept. See Rest. (2d) Torts § 431.

will be allowed to recover only damages actually caused by the misrepresentation." Robbins v. Kroger Properties, Inc., 116 F.3d 1441, 1447 n.5 (11th Cir. 1997). Third Circuit precedent instructs that loss causation is a fact intensive inquiry which is best resolved by the trier of fact. See EP Medsystems, Inc. v. EchoCath, Inc., 235 F.3d 865, 884 (3rd Cir. 2000). Where a plaintiff alleges a fraud-on-the-market theory based upon a public dissemination of misleading material facts, the causal nexus between the misleading statement and a plaintiff purchasing or selling that security may be presumed. See Basic v. Levinson, 485 U.S. 224, 242-47 (1988). As Lead Plaintiffs' theory does rest upon a fraud-on-the-market theory, the court finds that Lead Plaintiffs have met the loss causation element.[3] Defendants, therefore, are not entitled to summary judgment on these grounds.

D. Section 20(a)

Lead Plaintiffs allege that Don Tyson and John Tyson are also liable as controlling persons under § 20(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78a (2004). To be liable under § 20(a), a plaintiff must prove the following: (1) the defendant is a controlling person within the meaning of the statute; (2) a primary securities violation by a third party

[3]The court notes that defendants' criticism of Lead Plaintiffs' damages expert has merit as it relates to proving actual damages. The defendants' motion and the court's decision concern only the issue of proof of loss causation and, in that regard, the evidence is sufficient.

within the gambit of defendant's control; and (3) culpable participation by the defendant. Rochez Brothers, Inc. v. Rhoades, 527 F.2d 880, 888, 890 (3d Cir. 1975); In re Digital Island Sec. Litig., 223 F. Supp. 2d 546, 560 (D. Del. 2002). As the court has granted summary judgment as to primary liability of each defendant, there is not a predicate primary violation of federal securities law to sustain a claim under § 20(a). Further, the court also concludes that Don Tyson and John Tyson are entitled to summary judgment because Lead Plaintiffs have failed to demonstrate the requisite level of culpable participation.

Third Circuit precedent requires that a plaintiff prove culpable participation, i.e., "deliberate and intentional[]" action or inaction by the defendant "to further the fraud." Rochez Brothers, 527 F.2d at 890. Even if the issued statements constituted misrepresentations, where, as here, the undisputed facts are that Don Tyson and John Tyson did not participate in the drafting and release of the issued statements, did not dictate the specific content of the issued statements and did not review the content of the statements until they were publicly issued, Don and John Tyson cannot be said to have culpably participated. Lead Plaintiffs argue that this amounts to deliberate indifference. While deliberate inaction can rise to the level of culpable participation, it does so only if the

intent is to further the fraud of another. See Rochez Brothers, 527 F.2d at 890. At most, the evidence of Don and John Tyson's conduct would amount to negligence in failing to oversee the actions of corporate officers but that, without more, does not sustain a finding of controlling person liability. Consequently, Don Tyson and John Tyson are entitled to summary judgment on Lead Plaintiffs' claim under § 20(a).

E. Lead Plaintiffs' Motion for Summary Judgment

Having concluded that defendants are entitled to summary judgment on each of Lead Plaintiffs' claims, Lead Plaintiffs' motion for summary judgment will be denied. (D.I. 157)

V. CONCLUSION

For the reasons discussed above, the court will grant defendants' motions for summary judgment (D.I. 161, 163) and deny Lead Plaintiffs' motion. (D.I. 157) An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

In re: Tyson Foods, Inc. Securities Litigation	))))	Civ. A. No. 01-425-SLR

O R D E R

At Wilmington this 17th day of June, 2004, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that:

1. The motions of defendants Don Tyson, John Tyson, Les Baledge and Tyson Foods, Inc. for summary judgment are granted. (D.I. 161, 163)

2. Lead Plaintiffs' motion for summary judgment is denied. (D.I. 157)

3. The Clerk of the Court is directed to enter judgment in favor of defendants John Tyson, Don Tyson, Les Baledge and Tyson Foods, Inc. and against Lead Plaintiffs.

Sue L. Robinson
United States District Judge